In the result, certiorari must go to quash the verdict and sentence of the court martial and I therefore make a further order that the costs of these proceedings be paid by the respondents to the applicants. It follows, therefore, that the decision of the confirming officer confirming the finding and sentence of the court martial is set aside. I am now prepared to hear arguments as regards any consequential orders I should make.

Application allowed.

Solicitors: *Karpal Singh & Co.*

Reported by *Yap Shao Sin*

Sungei Way Leasing Sdn Bhd v Sena Land Development Sdn Bhd

HIGH COURT (PENANG) – CIVIL SUIT NO 22-3-88
EDGAR JOSEPH JR J
12 MAY 1989

Civil Procedure – Summary judgment – Triable issues – Lack of bona fides – Conditional leave to defend – Conditions – Rules of the High Court 1980, O 14

By an agreement in writing, the plaintiff had agreed to sell and the defendant to purchase certain equipment. It was a condition of the agreement that the ownership of and title to the equipment shall remain vested in the plaintiff until the full payment of the purchase price. Possession of the equipment was delivered to the defendant. The plaintiff later commenced an action based upon a breach and repudiation of the contract by the defendant and made an application for summary judgment under O 14 of the Rules of the High Court 1980. There was a dispute between the parties as to the amount owing to the plaintiff by the defendant and as to ownership of the equipment. The plaintiff confined themselves to seeking summary judgment for repossession of the equipment and in the alternative an order that the defendant be given leave to defend conditional upon the defendant delivering the equipment to the plaintiff to hold as security pending the trial of the action subject to the undertaking that the plaintiff will not part with the same save in accordance with any order of court and so to preserve the status quo. A procedural point was taken for the defendant, namely, that the application for summary judgment was premature in that at the date of its issue no appearance had as yet been entered, contrary to O 14 r 1(1). It was also contended that time was no longer of the essence of the contract as the plaintiff had accepted late instalment payments to account of the purchase price and had not reimposed the requirement that time be made the essence of the contract. The defendant also claimed that the equipment had become a fixture and that therefore ownership thereof accrued with the land on which it stood. Another defence raised was that the agreement was an unregistered bill of sale and not being in the statutorily-prescribed form was void for lack of registration. It was alleged by counsel for the plaintiff, and not challenged by counsel for the defendant, that the plaintiff was incurring costs in keeping the equipment under surveillance. Counsel for the plaintiff said that the appropriate condition to impose in the circumstances of the case as a whole was that unless the defendant delivered to the plaintiff possession of the equipment not later than 4pm on 10 March 1989, to be held by the plaintiff pending the final determination of the action, the plaintiff be at liberty to enter final judgment against the defendant for possession of the equipment and delivery of the same by the defendant forthwith, with damages to be assessed and costs of the action to be taxed.

Held, allowing the application:

(1) The irregularity regarding the commencement of the O 14 proceedings although no appearance had been entered had been waived by the defendant by taking a step in the proceedings, to wit, by filing a defence and moreover, at an earlier hearing, counsel for the defendant had appeared and argued the application on its merits. In any event, the court had a discretion to condone the irregularity under O 2 r 2 which the court chose to exercise since a dismissal on such a ground would merely have served to delay the proceedings and add to the costs.

(2) The submission as regards time being of the essence of the contract was irrelevant at that stage of the proceedings as the money claimed was not being pursued in the application and the court was concerned with a claim for possession of the equipment.

(3) Even if it were true that the equipment was indeed a fixture (and there was no evidence of this), there was no triable issue raised thereby. There was not a scrap of evidence to support the contention that the agreement was an unregistered bill of sale having regard to the definition of a bill of sale in the Bills of Sale Ordinance 1950 although evidence at the hearing may prove otherwise.

(4) It was common ground that the defendant had not paid a cent towards the substantial balance owing since November 1985, whilst still enjoying the use of the equipment, which was a profit-yielding chattel. In the absence of a satisfactory explanation – and the court did not consider there was any – there were facts from which the court could infer that prima facie the defendant's worth was in doubt and that its defence was lacking in good faith.

(5) Whilst the defendant should be granted leave to defend, the court should, in the exercise of its discretion, impose conditions to the order granting leave. Any conditions imposed should be reasonable. Just as it was important to ensure that a defendant is not deprived of his right to defend if he has an argument worth listening to, so it is equally important not to deprive him of that same right by imposing conditions on the grant of leave with which he is quite unable to comply.

(6) In all the circumstances of the case, the court exercised its discretion by making an order in the terms proposed by counsel for the plaintiff.

Cases referred to

1 *Ionian Bank Ltd* v *Couvreur* [1969] 1 WLR 781 (refd)
2 *Paclantic Financing Co Inc* v *Moscow Narodny Bank Ltd* [1984] 1 WLR 930 (refd)
3 *Vann Lynn Development Ltd* v *Pelias Construction Co Ltd* [1969] 1 QB 607 (refd)
4 *Ward* v *Plumbley* (1890) 6 TLR 198 (refd)
5 *Rosengrems Ltd* v *Safe Deposit Centres Ltd* [1984] 1 WLR 1334 (refd)
6 *Pilings* v *Kent Investments Ltd* [1985] 4 Const LJ 393 (refd)
7 *Shell International Petroleum Company Limited* v *Transnor (Bermuda) Ltd* The Times, 24 April 1987

Legislation referred to
Bills of Sale Ordinance 1950
Rules of the High Court 1980 O 14 r 1, O 32 r 9

Richard Tallala (G Chan with him) for the plaintiff.
Yeap Chye Choon for the defendant.

Cur Adv Vult

Edgar Joseph Jr J: This was an application by summons-in-chambers for summary judgment under O 14 arising out of a simple and straightforward claim based upon a breach and repudiation of contract of sale and purchase of a secondhand Nigata NP asphalt plant ('the equipment'). By an agreement in writing dated 20 March 1985 entered into between the plaintiff and the defendant, the plaintiff agreed to sell and the defendant agreed to purchase the equipment at the price of $664,120 payable by an initial forfeitable deposit of $36,000 on execution of the agreement, a second payment of $64,000 on or before 31 March 1985 and a final payment of $564,120 on or before 31 May 1985. It was a term and condition of the agreement that the ownership and title of the equipment shall remain vested in the plaintiff until the full payment of the purchase price.

Although there was a dispute as to whether the defendant owed a balance of $558,128 as contended for on behalf of the plaintiff or $474,120 as contended for on behalf of the defendant, so that the questions which remained to be litigated between the parties was the difference between these sums and the issue of ownership of the equipment, at the end of the argument, counsel for the plaintiff confined his contention to seeking summary judgment for repossession of the equipment which was the primary relief prayed for in the application. In the alternative, he sought to contend that the defendant be given leave to defend conditional upon it delivering the equipment to the plaintiff to hold as security pending the trial of the action subject to the undertaking that the plaintiff will not part with the same save in accordance with any order of court and so to preserve the status quo.

Counsel for the defendant begins by taking a procedural point. He contends that the application for summary judgment was premature in that at the date of its issue no appearance had as yet been entered, contary to O 14 r 1(1). I did not consider that there was substance in this point because it was clear the defence had waived the irregularity by taking a step in the proceedings, to wit, by filing a defence and moreover, at an earlier hearing, counsel for the defendant had appeared and argued the application on its merits. In any event, I was of the view that I had a discretion to condone the irregularity under O 2 r 2 which I chose to exercise since a dismissal of the application on such a ground would merely have served to delay the proceedings and add to the costs. I felt that in the circumstances, what mattered was the merits of the application. It was next contended by counsel for the defendant that although cl 12 of the sale and purchase agreement made time for the instalment payments the essence of the contract so that full payment had to be made by 31 May 1985, yet the plaintiff had accepted nine late instalment payments after that date, thus waiving the breaches arising therefrom. Thereafter, it was said that the plaintiff ought to have, but did not serve the defendant with a notice reimposing the requirement that time be made the essence of the agreement, with the result that the plaintiff's action was premature.

In view of the stand taken by counsel for the plaintiff, I did not consider this submission of counsel for the defendant of any relevance at this stage of the proceedings. Different considerations might have arisen if the money claim was being pursued in the application but here I was concerned with a claim for possession of the equipment. What however was at the heart of the application was the provision of cl 10 of the sale and purchase agreement, that ownership and title to the equipment shall remain vested in the plaintiff until the full payment of the balance purchase price. Such retention of title clauses – known as Romalpa clauses – are common place in commercial contracts but their effectiveness is subject to satisfactory negotiation of a combination of technical aspects of the law of sale of goods, bailments, trusts, mortgages and tracing. I hasten to add, however, that I did not overlook the submission of counsel for the defendant that the machinery being a fixture, ownership thereof accrued with the land on which it stood. However, when I asked counsel, during the argument, if the land concerned was his client's property, he was not in a position to say that it was. It is an established principle, too well known to need citation of authority, that generally, a wrongdoer cannot set up the jus tertii, so that even if it were true that the equipment was indeed a fixture (and there was no evidence of this) I did not consider that a triable issue had been raised thereby. Another defence raised was that the sale and purchase agreement was an unregistered bill of sale and not being in the statutorily prescribed form was void for lack of registration. There was not a scrap of evidence to support this contention having regard to the definition of a bill of sale in the Bills of Sale Ordinance 1950. But, of course, evidence at the hearing may prove otherwise.

Furthermore, it was common ground that the defendant had not paid a cent towards the substantial balance still owing since November 1985, whilst still enjoying the use of the equipment, which was a profit-yielding chattel. In the absence of a satisfactory explanation – and I did not consider there was any – these were facts from which I could infer that prima facie the defendant's worth was in doubt and that its defence was lacking in good faith. At the end of the day, I was of the view that the defences raised were so shadowy that I was very nearly ready to give the plaintiff summary judgment under O 14.

In *Ionian Bank Ltd* v *Couvreur*,[1] the Court of Appeal in England, being satisfied that the defence raised by the defendant was not a sham, nevertheless took the view that it had little or no substance and 'the case was almost one in which summary judgment should be ordered' (per Davis LJ at p 788) and was described as so 'shadowy' that the judge was right in giving leave to defend only on condition that the full amount should be brought into court (per Denning LJ at p 787). See also *Paclantic Financing Co Inc* v *Moscow Narodny Bank Ltd*[2] and *Vann Lynn Development Ltd* v *Pelias Construction Co Ltd*.[3] Accordingly, I considered that whilst the defendant should be granted leave to defend, I should, in the exercise of my discretion, impose conditions to the order granting leave. In deciding what conditions I should impose, I recognized that any conditions I imposed should be reasonable. Just as it was important to ensure that a defendant is not deprived of his right to defend if he has an argument worth listening to, so it is equally important not to deprive him of that same right by imposing conditions on the grant of leave with which he is quite unable to comply. (See *Ward* v *Plumbley*[4].)

As to the mode of security, I recognized that almost invariably the plaintiff's position is secured by an order requiring the defendant to pay a specified sum into court. Nevertheless there would seem to be no objection to other forms of security which have a similar effect such as a bank guarantee or a solicitor's undertaking. (See *Rosensgrens Ltd* v *Safe Deposit Centres Ltd*[5].) In *Pilings* v *Kent Investments Ltd*,[6] the Court of Appeal, having formed the opinion that the defendants' contentions were 'somewhat shadowy, but just sufficient', ordered them to provide security for the plaintiff's claim to the extent of £70,000 by way of a bank guarantee as condition of staying proceedings pending the determination of the dispute by arbitration. Now, it was alleged by counsel for the plaintiff, and not challenged by counsel for the defendant, that the plaintiff was incurring costs in keeping the equipment under surveillance and, that taking the circumstances of the case as a whole, the appropriate condition to impose was that unless the defendant delivered to the plaintiff possession of the equipment not later than 4 pm on 10 March 1989, to be held by the plaintiff pending the final determination of the action, the plaintiff be at liberty to enter final judgment against the defendant for possession of the equipment and delivery of the same by the defendant to the plaintiff forthwith, with damages to be assessed and costs of the action to be taxed. Counsel for the defendant made no attempt whatever to oppose the condition proposed by counsel for the plaintiff.

In all the circumstances, and after careful consideration, I exercised my discretion by making an order in the terms proposed by counsel for the plaintiff. That is sufficient to dispose of this case but, in the wider interests of justice, there is a practice point of very considerable importance to which I should like to advert and it is this: The hearing of the O 14 summons before me was conducted partly in chambers and partly in open court for convenience. On reflection, having regard to the ruling of Steyn J in *Shell International Petroleum Company Limited* v *Transnor (Bermuda) Ltd*[7], an authority which was not cited to me, and a commentary thereon appearing in the Civil Justice Quarterly (Vol 87 April 1988, pp 89-91) and which I perused only after pronouncing my decision in the present case, I should, perhaps, have conducted the entire hearing in open court. The passage in the judgment of Steyn J to which I should like to refer reads as follows:

> The sole question for decision is whether the plaintiffs are entitled to summary judgment. In the usual way the matter was due to be heard in chambers. In such matters commercial court hearings are held in chambers as a matter of convenience. But in my judgment it was not appropriate, in the light of the defendants' allegations, for the matter to be heard in chambers. In the circumstances the hearing took place in open court and my judgment is being given in open court.

It is true that the reason the learned judge gave for conducting the proceedings in open court was because of the nature of the allegations made by the defendant against the plaintiff; namely, serious charges of financial and commercial misconduct involving conspiracy. In this case, no doubt, no such allegations were made. But, the editors of the Civil Justice Quarterly have gone further and advocated (see p 91) that as a matter of principle, the general practice should be that the hearing of O 14 applications should be in open court unless the judge otherwise orders, their reasoning being:

> It should be generally realized that applications for summary judgment under O 14 have the character of a trial on the merits, though without the benefits of prior discovery or cross-examination. They cover a wide range of subject matter and their very conduct and content qualify them to be in the public domain. The public has a continuing and abiding interest in the open system of civil justice and all the more so in proceedings which may lead to a final judgment in the matter. There is nothing confidential in the disputes between the parties that are dealt with on the hearings for summary judgment and there is no reason in principle why they should continue to be held in private, ie in chambers. It would add greatly to increasing the sense of confidence of the public in the administration of civil justice if, as a start, the hearings of applications for summary judgment under O 14 before the judge were to be held in open court unless the judge otherwise orders.

But, if the recommendations aforesaid are implemented in this country, then it would appear that the registrar of the High Court (which expression includes a senior assistant registrar), whose jurisdiction is circumscribed by O 32 r 9, would be precluded from hearing applications for summary judgment, and this would add to the burden of overcrowded judicial lists of judges of the High Court. Perhaps, this appeal will provide the opportunity

for the Supreme Court to afford guidance on this practice point.

Order accordingly.

Solicitors: *Lim Kean Siew & Co*; *Yeap Chye Choon & Co.*

Reported by *PS Ranjan*

Che Wan Development Sdn Bhd v Co-operative Central Bank Bhd

HIGH COURT (KUALA LUMPUR) – ORIGINATING SUMMONS NO S5-31-3640-88
NH CHAN J
5 MAY 1989

Civil Procedure – Stay of execution pending appeal – Application by defendant – Inherent jurisdiction of court to stay execution – No general inherent jurisdiction unless power conferred by rules of court or statutes – Appeal does not operate as stay – Special circumstances – Whether appeal may be rendered nugatory – Rules of the High Court 1980, O 47 r 1 – Courts of Judicature Act 1964, s 73

This is an application by the defendants for a stay of execution pending appeal to the Supreme Court. The court had on 30 March 1989 declared that a charge on the plaintiff's lands in favour of the defendant as chargee was void and unenforceable as it contravened the provisions in s 133 of the Companies Act 1965 on this type of transactions. On 24 April 1989 the court also ordered that the registration of the charge be cancelled and that all documents of title be returned to the plaintiff. The defendant has filed notice of appeal to the Supreme Court. In this application, the defendant applicant contended that there were merits in its appeal, and that the plaintiff was an insolvent company and would not be able to pay damages in the event that the defendant succeeded in its appeal. The defendant also argued that if the appeal went in its favour, it would face inconvenience in having to bring proceedings against 11 purchasers as the documents of title would have been returned to the plaintiff, who in turn may return them to the sub-purchasers. The main issue here was whether the court has the general inherent jurisdiction to grant the stay of execution pending the appeal.

Held, dismissing the application for a stay of execution:

(1) It seems plain that the court has no general inherent jurisdiction to grant a stay of execution beyond the jurisdiction given by certain statutes or rules of court. In the present case, which is an application for a stay of execution by the defendant, O 47 r 1(1) of the Rules of High Court 1980 does not apply as the rule only applies to money judgments. The only thing that is applicable here is s 73 of the Courts of Judicature Act 1964.

(2) An appeal does not operate as a stay of execution. (See s 73 of the Courts of Judicature Act 1964 (Rev 1972)). Under s 73 the court has a discretion as to the granting or refusing of a stay of execution pending appeal and that as a rule it will only grant a stay if there are special circumstances, which circumstances must be deposed to on the affidavit supporting the application. The wording in s 73 gives a judicial discretion to the court which must be guided by proper rules founded on principle. It is plain that the validity or correctness of the decision appealed from are not special circumstances. Similarly, in the case of a money judgment, where O 47 r 1(1) applies, the court is not to have regard to the validity or correctness of the judgment but only to concern itself with the special circumstances which are relevant to the enforcement of the judgment. In other words, grounds affecting the validity or correctness of the judgment or order appealed from are not special circumstances. Merits or strong ground for an appeal are also not special circumstances. In short, neither merits or strong grounds for an appeal nor the validity or correctness of the judgment appealed from are special circumstances which would entitle the defendant to a stay of execution.

(3) In the instant case, apart from merely contending that the plaintiff is an insolvent company and would not be able to pay damages in the event of the defendant's appeal being successful, the defendant did not in its affidavit supporting the application for a stay of execution adduce any evidence to show that that is so. No evidence has been adduced in its affidavit to show that the plaintiff is an insolvent company and would therefore not be in a position to pay damages in the event of the defendant's appeal succeeding. Unless evidence is adduced to the contrary, the court must assume that the plaintiff is not insolvent. As for the payment of damages the court has not made such an order. It is something which the Supreme Court could make in the event of the defendant succeeding in its appeal. Therefore, there is no question of the court staying execution on the damages which it has not decreed.

(4) If it is not a money judgment or order as is the case here, as a general rule, the only other ground for a stay of execution is to show that there are special circumstances in evidence (which evidence must be deposed to on affidavit at the application for a stay) showing that if the defendant succeeded in its appeal it would be rendered nugatory. The authority for this is *Wilson* v *Church*. But in the present case, the position is very much different from the situation as occurred in *Wilson* v *Church*. In the instant case, there were only 11 purchasers and they could be easily found as opposed to the bondholders who would be quite untraceable after the money is paid out in *Wilson* v *Church*. In fact, the defendant's complaint is not that the purchasers would be difficult to trace or that they were untraceable if the titles were transferred to them but that the defendant would be faced with inconvenience by having to recover from the purchasers if the appeal went in the defendant's favour. Again there is no evidence which has been deposed to on affidavit which would enable this court to find that if a stay is not granted the appeal if successful would become nugatory. All that has been shown is that if the defendant succeeded in its appeal, it would face inconvenience in having to bring proceedings against the 11 purchasers. In other words, the appeal, if successful would not be nugatory. Inconvenience there is no doubt, but not nugatory. For the court to interfere, it has first to be satisfied that the appeal will be rendered nugatory in that there will be danger of the title not be forthcoming if it is successful.

(5) The application for a stay of execution was therefore dismissed with costs.

Cases referred to

1 *London Permanent Benefit Building Society* v *De Baer* [1969] 1 Ch 321 (refd)
2 *Polini* v *Gray* [1879] 12 Ch D 438 (cited)
3 *Marine and General Mutual Life Assurance Society* v *Feltwell Fen Second District Drainage Board* [1945] KB 394 (refd)